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No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1947

CIVIL AERONAUTICS BOARD, PETITIONER

v.

WATERMAN STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 159 F. 2d 828 (R. 407). The opinion of the Civil Aeronautics Board is reported in 6 C. A. B. 857 (R. 118).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 14, 1947 (R. 413). The petition for a writ of certiorari was filed on May 13, 1947, and was granted on June 16, 1947.[1]

[1] A petition for a writ of certiorari also was filed by Chicago and Southern Air Lines, Inc., intervenor, on May 6, 1947, and was granted June 16, 1947.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. 347.

QUESTION PRESENTED

Whether an order issued by the Civil Aeronautics Board granting and denying applications for certificates of public convenience and necessity authorizing American air carriers [2] to engage in overseas and foreign air transportation is subject to judicial review when such order has been approved by the President of the United States pursuant to the provisions of section 801 of the Civil Aeronautics Act.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[3] which will be referred to as the Act, are set forth in the Appendix, *infra*, pp. 66–73.

STATEMENT

On December 19, 1940, Waterman Airline, Inc., a subsidiary of respondent, filed with the Civil

[2] The terms "air carrier" and "air transportation" referred to herein are defined in subparagraphs (2), (10), and (21) of section 1 of the Civil Aeronautics Act of 1938, as amended. These and other pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 66–67.

[3] Act of June 23, 1938, c. 601, 52 Stat. 977, 54 Stat. 1235 (49 U. S. C. 401, et seq.).

Aeronautics Board[4] an application seeking a certificate of public convenience and necessity under Section 401 of the Act to engage in air transportation between the United States and Puerto Rico (R. 42). Subsequently, amended applications were filed, one of which substituted respondent as the applicant (R. 95, 96). Chicago and Southern Air Lines, Inc., also filed an application with the Board on October 5, 1942, which, as later amended, sought a certificate to engage in air transportation over various routes in the Caribbean, Central and South American areas, including a route between New Orleans, Louisiana and San Juan, Puerto Rico, via certain specified intermediate foreign points (R. 3–4, 232).

Thereafter the Board consolidated for hearing under Docket 525, et al., entitled *Additional Service to Latin America*, a total of twenty-nine applications filed by fifteen applicants (including those filed by respondent and Chicago and Southern Air Lines, Inc.) seeking certificates to engage in air transportation between the United States and points in Mexico, Central and South America, and the Caribbean Area (R. 124–125, 231–241).

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[4] Reorganization Plan No. IV, 5 F. R. 2421–2423, which became effective on June 30, 1940, reassigned the duties and functions of the "Civil Aeronautics Authority" under the Act in terms of the "Civil Aeronautics Board" and the "Administrator of Civil Aeronautics." Petitioner will be referred to herein either as the "Civil Aeronautics Board" or the "Board."

Prior to hearing, copies of the various applications were transmitted to the President of the United States as required by Section 801 of the Act (R. 124). After due notice, public hearings were held before examiners of the Board from September 18 to October 13, 1944. Briefs to the examiners were filed on December 14, 1944, and the examiners' report was served on all parties on March 5, 1945. Exceptions and briefs to the Board in support thereof were filed on March 20, and April 23, 1945, respectively, and oral arguments by the fifteen applicants and ten intervenors were heard by the Board from April 30, 1945 to May 5, 1945 (R. 124–125).

At the conclusion of its deliberations, the Board prepared an opinion and a proposed order granting and denying applications for certificates. Pursuant to Section 801, the decision of the Board, consisting of its opinion and proposed order and certificates, was submitted to the President for his approval (R. 125). The proposed disposition of the applications was disapproved in part by the President, though not with respect to the route here involved, and the Board's opinion, proposed order and certificates were returned to it for further action in conformity with the President's directions (R. 125).

An amended opinion and proposed order and certificates, revised to reflect the desires of the President, were again submitted to him, and the

President approved this revised disposition of the applications on May 22, 1946 (R. 263). The Board then published its opinion (R. 118) and the order as approved by the President (Order Serial Number 4793, dated May 17, 1946, R. 256–263). Included among the applications denied by this order was that of respondent (R. 263). The order and the certificate granted to Chicago and Southern Air Lines, Inc., were approved by the President on May 22, 1946 (R. 269–271).

A motion which had been filed by Waterman on May 6, 1946 requesting reopening and reargument of the proceeding was denied by Order Serial Number 4795 dated May 17, 1946 (R. 114). After the final decision approved by the President had been published, Waterman filed a petition for rehearing and reconsideration on June 24, 1946 (R. 290–303). This petition was denied by Order Serial Number 4977 dated July 12, 1946 (R. 328–330). Thereafter Waterman filed a petition in the court below seeking review of the Board's actions (R. 1–9).

In the petition below, the court was requested to review (1) the Board's final disposition of the proceeding as approved by the President, (2) denial of the interlocutory motion to reopen the proceeding, (3) denial of the petition for rehearing and reconsideration, and (4) a certain dictum of the Board contained in its opinion concerning

the status under the Act of surface carrier applicants for certificates of public convenience and necessity.

The Board filed a motion to dismiss the petition for review for lack of jurisdiction, or, in the alternative, to affirm the Board's orders (R. 27). Chicago and Southern intervened and filed a similar motion (R. 360, 388). By leave of court, the motions were heard on an abbreviated record containing the applications, orders, and related documents pertinent to the jurisdictional issues raised (see R. 408).

The court below denied the motions to dismiss, holding that it had jurisdiction to review under Section 1006 (a) of the Act notwithstanding the fact that the Board's actions in granting and denying certificates were subject to and had received approval by the President (R. 407–412).

On May 13, 1947 the Board filed in this Court a petition for a writ of certiorari. The intervenor, Chicago and Southern, had filed such a petition on May 6, 1947. Both petitions were granted on June 16, 1947.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that orders issued by the Civil Aeronautics Board after approval by the President of the United States pursuant to Section 801 of the Act are subject to judicial review under Section 1006 (a) of the Act.

(2) In holding that it has jurisdiction to review an order upon which it cannot render a judgment with finality and conclusiveness.

(3) In failing to grant the motion to dismiss filed by the Civil Aeronautics Board.

SUMMARY OF ARGUMENT

I

Section 801 of the Civil Aeronautics Act provides that orders of the Civil Aeronautics Board with respect to foreign air transportation are subject to the approval of the President. The reason for this is the relationship between such transportation and considerations of international relations and the national defense. In recognition of the President's constitutional control over these executive functions, the statute gives the President a supervisory power which he may exercise on the basis of information and advice received from the diplomatic and military branches of the Government without being limited to the facts in the record before the Board.

Section 1006 (a) provides for judicial review of "any order" of the Board "except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801". The limited nature of the excepting clause by itself would suggest that orders in respect of American air carriers engaged in foreign air transportation were to be reviewed. But re-

spondent and the court below have conceded that the President's decision is not reviewable, and that the President may approve or disapprove any order of the Board even after it has been conformed to the judgment of a reviewing court.

To construe the Act in accord with the decision below as requiring judicial review of the Board's decision but as empowering the President to disregard the judgment of the court would conflict with well established doctrine as to the nature of the judicial power under the Constitution. For ever since *Hayburn's Case* in 1792 this Court has held without deviation that the courts created under Article III of the Constitution may only act judicially, that judicial action contemplates the making of judgments which will be binding on the parties, and that a judgment is not judicial if it is subject to review by an administrative official. In addition, orders relating to foreign air transportation raise issues of foreign relations and military policy such as the courts have treated as political matters which are not adaptable to judicial control. Section 1006 (a) should be given a constitutional construction which will avoid these difficulties.

The statute is susceptible of such a construction despite the limited excepting clause. The phrase "any order" in other statutes providing for judicial review has been construed as not authorizing review of orders which are not final

in nature. Furthermore, to permit orders which the President must approve to be reviewed would be inconsistent with the scheme specifically provided for in Section 801 whereby the orders of the Board are submitted to and approved by the President before publication. The only order which the Board ever publicly promulgates is that which embodies the views of the President. As a result, a court cannot review the Board's decision prior to presidential approval. To permit judicial review after the President has approved would in fact constitute a review of the exercise of the President's executive power. The difficulties in the way of review where the President does not act on the basis of the Board's record, and need give no reason for his decisions, are obvious.

The provisions in Section 1006 (d) and (f) giving the circuit courts of appeals "exclusive jurisdiction" to modify and set aside the Board's orders with review "only" in the Supreme Court are also not compatible with ultimate review by the President. And the standard provision for finality of the Board's fact findings if supported by substantial evidence would hardly be appropriate when the actual order entered may be based upon the President's consideration of matters outside the Board's record.

We submit that the internal statutory contradictions which will arise if Section 1006 (a) be

interpreted as permitting judicial review of Board orders which are subject to the President's approval under Section 801, as well as the necessity of giving the Act a constitutional construction, demonstrate the correctness of the decision of the Second Circuit in *Pan American Airways, Inc.* v. *Civil Aeronautics Board,* 121 F. 2d 810, holding that such orders may not be reviewed.

II

If Section 1006 (a) of the Civil Aeronautics Act is construed as providing judicial review for orders of the Civil Aeronautics Board which are subject to the approval of the President, such review is inherently limited to the determination of whether such orders are beyond the authority conferred by the Act and were issued after compliance with the statutory procedures. The courts may not review the exercise of the President's discretion in the field of foreign and military policy. And since the President in exercising his discretion is not required to limit himself to the evidence before the Board, there can be no record upon which a reviewing court may determine whether his decision is supported by evidence. Such a pattern of limited review is identical with that involved by the courts in dealing with a similar situation under the tariff laws.

The questions raised by respondent's petition for review relate almost entirely to the correct-

ness of the Board's findings and the adequacy of the evidence to support them, which questions under the above test are not susceptible of review after the order has been approved by the President. The other alleged errors, asserting the absence of a finding and the Board's reliance on an erroneous principle of law, are shown to be baseless on the face of the Board's opinion, which contains the finding asserted to be lacking and which explicitly states that the Board did not invoke the principle of law to which respondent refers. Thus, even if it be assumed that the Board's order, as approved by the President, may be reviewed to a limited extent, respondent's petition for review should still be dismissed.

ARGUMENT

INTRODUCTION

The issue in this case is whether orders of the Civil Aeronautics Board which are subject to approval by the President may be reviewed by the circuit courts of appeals under Section 1006 (a) of the Civil Aeronautics Act. The jurisdiction of the circuit courts of appeals is derived only from that section. No question is presented as to whether Board orders approved by the President are in no circumstances to be reviewed by any court. Cf. *American Federation of Labor* v. *Labor Board*, 308 U. S. 401, 404. Any review, however, would necessarily be limited to whether the order was within the authority conferred by

the statute and in accordance with statutory procedures; the courts cannot review the exercise of the President's discretion in the field of foreign and military policy, in which the President need not act on the basis of the evidence in the public record. If this Court should be of the view that judicial review of presidentially approved orders is available under Section 1006 (a), such review is inherently so limited, for reasons set forth at greater length in Point II hereof.

I

ORDERS OF THE CIVIL AERONAUTICS BOARD WHICH ARE SUBJECT TO PRESIDENTIAL APPROVAL MAY NOT BE JUDICIALLY REVIEWED

The Civil Aeronautics Act provides that the Civil Aeronautics Board shall issue certificates of public convenience and necessity for all air transportation (interstate and foreign) by American air carriers (Section 401, Section 1 (2)), and permits to foreign air carriers to engage in foreign air transportation (Section 402).[5] But as to foreign and overseas[6] air transportation (whether by

[5] Foreign air transportation is defined to mean transportation between the United States and places outside thereof. (Section 1 (21) (c).)

[6] Overseas transportation is defined as transportation between the United States and its territories or possessions or between such territories and possessions. Inasmuch as transportation between the United States and Puerto Rico involves routes touching Cuba, San Domingo, Haiti, and Jamaica there is in substance no difference between foreign and overseas transportation in so far as this case is con-

American or foreign carriers), Section 801 makes the issuance and denial, *inter alia*, of all certificates and permits "subject to the approval of the President".

Section 1006 (a) provides that:

> Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia * * *

The exception in this provision for orders "in respect of any foreign air carrier subject to the approval of the President" under Section 801, and the absence of a similar exception for orders relating to foreign air transportation by American carriers, is an indication, of course, that Congress intended Board orders respecting American air carriers in foreign air transportation to be reviewed.

The statute, however, does not provide for any review of *the President's* determination, and, indeed, it is admitted in this case that the President's decisions are not reviewable.

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cerned. "Overseas" transportation was subjected to the President's authority because of its strategic military importance (see p. 23, *infra*) and because of its integration with foreign air transportation. The relationship between transportation to this country's territories and possessions in the Caribbean and the Pacific and the national defense needs no elaboration.

Both the court below[1] and respondent in its brief[2] disclaimed any contention that the court had authority to pass upon any exercise of the President's authority.

The result under the decision below is that the orders of the Board are reviewable, but that such orders are to be submitted to the President after they have been judicially approved, and the President is then free to disregard the court's action if he sees fit. It is our position that other provisions of the Act would be unworkable if Section 1006 were so construed, and that to construe the statute as authorizing the courts to review orders of the Board which, even after judicial review, are concededly subject to the approval of the President would bring the statute into conflict with the limitation imposed upon the courts by Article III of the Constitution. The difficulties created by so reading Section 1006 (a) can be avoided if, as in other statutes providing for judicial review, the phrase "any order" is interpreted as excluding the essentially interlocutory pronouncements

[1] The opinion below states: "The court has no power to question or review either the approval or disapproval of the President. He does not have even to state his reasons. * * * the Board's action is subject to court review to the extent the Act provides and permits. It is not final until the Board and the court have completed their functions. Thereafter the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801." (R. 411.)

[2] "It must be kept in mind that we are *not* requesting this Court to review the action of the President." (Respondent's brief below, p. 26.)

of the Civil Aeronautics Board which are subject to Presidential approval. The Act was so construed, and we submit, correctly, by the Second Circuit in *Pan American Airways* v. *Civil Aeronautics Board*, 121 F. 2d 810,[9] for reasons which we shall now elaborate.

A. THE CLOSE RELATIONSHIP OF FOREIGN AIR TRANSPORTATION TO FOREIGN AND MILITARY POLICY

An understanding of the intimate relationship of overseas and foreign air transportation to international relations and national defense contributes materially to an understanding of the purposes underlying Section 801, of the necessity for subjecting the action of the Board in this field to the authority of the President, and of the unsuitability of the subject for judicial review.

It is universally accepted that each nation has complete and exclusive sovereignty of the air space superadjacent to its territorial lands and waters, and that navigation of foreign aircraft through such air space is permitted only upon consent of the nation concerned.[10] Thus no nation

[9] See also *Pacific Overseas Airlines Corp.* v. *Civil Aeronautics Board*, 161 F. 2d 633 (App. D. C.) which assumed the correctness of the Second Circuit's interpretation.

[10] International Convention for the Regulation of Aerial Navigation, signed at Paris on October 13, 1919 by representatives of twenty-six countries (not ratified by the United States); Convention of Commercial Aviation, signed at Havana, February 20, 1928 (to which the United States is a party); Sec. 6 (a), Air Commerce Act of 1926, 44 Stat. 568, 49 U. S. C. 176; Part I, Convention on International Civil Aviation, Articles 1 and 6 (Executive A; 79th Cong., 1st Sess.).

can grant its citizens rights to fly to or over other countries without obtaining their consent, and this means that such rights can be secured only through negotiation and agreements between nations. To inaugurate a foreign air transportation service between the nations of the world today thus requires the invocation of the intricate machinery of diplomatic negotiation for access to, and landing rights in, foreign countries and for other aeronautical privileges and facilities. Such negotiations necessarily involve considerations of economic policy and of national defense.

In order to avoid international friction and to promote international cooperation, the nations of the world have created a permanent International Civil Aviation Organization,[11] which now has become affiliated with the United Nations.[12] The member States of ICAO have explored the possibility of effecting a multilateral agreement on commercial rights in international air transport, but discussions to date on this subject have disclosed that important countries are not sufficiently in accord.[13] Accordingly such commercial rights

[11] Established pursuant to the Convention on International Civil Aviation, ratified by the Senate on July 25, 1946 (Executive A; 79th Cong., 1st Sess.). The permanent organization, ICAO, came into existence on April 4, 1947 upon ratification by the requisite twenty-six nations. A total of 47 nations participated in the first Assembly in Montreal, May 6–27, 1947.

[12] Vol. XVI, The Department of State Bulletin, No. 415, p. 1147, June 15, 1947.

[13] *Id.*, at 1149.

continue to be the subject of bilateral conventions and agreements between sovereignties. In order to provide for necessary rights involved in commercial operations, the United States has concluded thirty-four bilateral air transport agreements.[14] Moreover, the President, through the State Department and by personal emissaries, continues to conduct negotiations for additional air transport agreements with other nations.

In negotiating international agreements as to foreign air transportation the President is necessarily guided not only by the considerations which affect international trade and commerce but also by political and military factors as well. The very existence of commercial air routes with their physical facilities, and the valuable experience in flying them, are of great value to military forces, as experience in the war amply demonstrated.[15]

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[14] Reference: official information compiled by Aviation Division, Department of State.

[15] "Military considerations also play a part in the restriction of the freedom of international air commerce. Army and navy authorities are always afraid that their fortifications, bases and other military preparations will be observed from the air, or that foreigners will make surreptitious aerial surveys of the country. * * *

* * * * * * *

"The development of commercial air transport has, of course, a very close connection with a nation's military air power. The most important military advantage derived from air transport probably lies in the development of airways, of air navigation aids and of ground organization—all of which enormously facilitate the rapid movement of military aircraft. Furthermore, the existence of airlines makes it pos-

As was stated by Mr. Clinton M. Hester, who explained the bill which ultimately became the Civil Aeronautics Act, to the Congressional committees on behalf of the Interdepartmental Committee which had drafted the bill: [16]

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sible in emergencies to transport essential war materials and personnel rapidly. * * *" Oliver J. Lissitzyn, Rockefeller Research Fellow on the Staff of the Council on Foreign Relations, *The Diplomacy of Air Transport*, 19 Foreign Affairs, October 1940, pp. 156, 166, 169.

A significant application of this standard appears in *American Overseas Airlines, Inc., et al., South Atlantic Route*, 7 C. A. B. 285, 305 (1946), in which a route was awarded to Pan American Airways, Inc. from Natal, Brazil to a point on the coast of West Africa, via Ascension Island, primarily for the purpose of maintaining a base at Ascension Island for the future needs of national defense. In commenting upon the estimated cost of $1,500,000 to operate such route, the Board said, "Ordinarily such a cost could deter us in certifying this route. But considerations of national defense for the certification of this route have been advanced by high levels of the War and Navy Departments and of the Executive. Their interpretation of 'national defense'—an objective that under the Act we must heed—weighs heavily as against economy of operation."

[16] Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess. (1938), on H. R. 9738, pp. 147–148.

The Interdepartmental Committee mentioned consisted of Assistant Secretaries of six Executive Departments—State, War, Navy, Post Office, Commerce, and Treasury—assigned to study civil aviation bills and report recommendations to Congress. This Committee held hearings for two months during which representatives of every phase of the aviation industry appeared and testified concerning the type of aviation legislation that should be recommended. Conferences were also held with members of Congress. The drafting of the bill was done under the supervision of the Assistant Legislative Counsel of the Senate. *Id.*, at p. 36,

> * * * Now, where the President has control he can refer the matter to the State, War, and Navy Departments before he reaches a decision. You can see the necessity of the President, from an international defense standpoint, having an opportunity to review the question as to whether or not a certificate of convenience and necessity shall be issued to an American-flag air line flying through our Territories for the reason that they carry foreign passengers. We do not want foreign passengers flying over our fortifications in our Territories so that they can observe them.
>
> In flying to foreign countries, from a national defense and international relations standpoint, it is very important that the President, the War Department, and the Navy Department, as well as the State Department have something to say about where our air bases will be established in foreign countries.

Such factors have to be taken into account both in negotiation with foreign nations and in the awarding of air routes. Indeed, as a result of the established importance of international air transportation in a nation's foreign affairs and in national defense, most of the important nations of the world have a direct share in the ownership or management of international commercial air transport enterprise.[17] The practice of these

[17] Oliver J. Lissitzyn, *International Air Transport and National Policy* (1942), Council on Foreign Relations, p. 109.

nations demonstrates that international air transportation is in reality, directly or indirectly, an arm of the government whose nationality the carrier possesses.

It is thus clear that the establishment of international air transport services is rarely controlled by purely commercial considerations. Such services have become instruments of national policy, promoting international relationships, exalting national prestige, disseminating political and economic information, and furthering the national defense.[18] In determining such matters it is not inconceivable that the successful negotiation and continuation of bilateral agreements may substantially be influenced by such a consideration as whether or not a particular carrier which may be authorized to conduct the service is acceptable to the foreign country concerned.

Congressional recognition that the control of foreign air transportation is a part of the field of foreign affairs appears in Sections 802 and 1102 of the Civil Aeronautics Act. Section 802 requires the State Department to advise and consult the Board concerning negotiations of aviation agreements with foreign governments. Section

[18] See Dr. Goedhuis, lecturer in Air Law at Leiden University, *Civil Aviation After the War* (1942), 36 Am. J. Int. L. 596; Dinu, *Background of International Law, Monographs on the Background of Aeronautical Law* (1944), 23 Mich. S. B. J. 187, 194; Oliver J. Lissitzyn, *International Air Transport and National Policy* (1942), Council on Foreign Relations.

1102 provides that the Board shall perform its duties "consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries * * *".

That diplomatic negotiations are essential in dealing with air transportation between the United States and foreign countries is illustrated by the situation involved in the present case. In connection with the services authorized in this case, the State Department was required to enter into negotiations with the various Latin American countries for *ad interim* aeronautical rights on behalf of the carriers awarded certificates, pending negotiation and completion of bilateral air transport agreements. With reference to the certificate granted by the order of which review is sought herein, negotiations were necessary with the governments of Cuba, Haiti, and the Dominican Republic in order to secure landing rights and other aeronautical privileges to be made available to Chicago and Southern Air Lines. Further, that portion of the route awarded to Chicago and Southern between Houston-New Orleans and Havana is a segment of the route from the United States to South American points via Jamaica for which Chicago and Southern has been designated as the air carrier to operate pursuant to the Bilateral Air

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Transport Agreement with the United Kingdom.[19]

B. THE CIVIL AERONAUTICS ACT GIVES THE PRESIDENT SUPERVISORY POWER OVER FOREIGN AIR TRANSPORTATION

Our constitutional system entrusts the handling of all such diplomatic and defense matters to the President and those who act on his behalf. In the Civil Aeronautics Act Congress has affirmed his ultimate authority in Section 801, which subjects the Board's determinations in this field to his supervision.[20] In explaining the necessity for such a provision, Mr. Hester testified (House Hearings, pp. 37–40):

P. 37:

> The bill would require the new agency to exercise its executive functions, including

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[19] Route No. 11, Part B, of Annex No. 3, to the Bermuda Agreement provides for a route to be served by a United States air carrier between New Orleans and Houston, points in Cuba, Jamaica, Aruba and South American points. The British Government has been notified that Chicago and Southern has been designated as the United States carrier for this route pursuant to the Board's decision approved by the President in the Latin American Case.

[20] Since the statute itself gives the President final authority, there is no issue here as to the extent to which the President's power over this subject exists apart from statutory authorization. It is to be noted, however, that in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–320, the Court indicated that in matters of international relations the President possessed "a power which does not require as a basis for its exercise an act of Congress". See generally Corwin, *The President* (1940); Corwin, *President's Control of Foreign Relations* (1917); McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements*, 54 Yale L. J. 181 (1945).

those relating to national defense and international affairs, under the general direction of the President. All executive functions under the Constitution are vested in the executive branch of the Government and since much of the work of this new agency would be executive in character, the bill gives to the President his constitutional control over these executive functions.

P. 40:

The present bill * * * provides that the issuance of certificates authorizing the operation of an air line in overseas and foreign commerce shall be subject to the approval of the President. It was recognized that the operation of an air line between our Territories and possessions, and between the continental United States and our Territories, and possessions, involve the consideration of national-defense problems. It was further recognized that the operation of an air line between this country and a foreign country involves questions of international relations and national defense. Consequently, it was considered advisable to make the issuance of certificates authorizing such operations subject to the approval of the President, who is both the Commander in Chief of the Army and Navy and the custodian of the interests of the United States in foreign affairs.

See also pp. 38–39.

In the hearings on S. 3760 before the Senate Committee, Mr. Hester stated (p. 6):[21]

> The authority of the President under this legislation would be the power under section 801 to approve certificates authorizing the operation of American flag air lines in foreign air commerce.
>
> The CHAIRMAN. That is a natural function of the President in foreign affairs.

When the substitute bill, S. 3845, was reported out by the Committee, Senator Truman, acting at the request of Senator McCarran, moved consideration of the bill. In explanation of Section 801, Senator Truman stated (83 Cong. Rec. 6726):

> Certificates involving national defense: Section 801 of the substitute, unlike S. 3659, gives the President the power to approve or disapprove the issuance, denial, terms, and so forth, of certificates and permits for overseas and foreign operations. *This check is required by the very delicate questions of national defense which are involved.* * * *. [Italics supplied.]

Although the various bills underwent many changes, the provisions of the present Section 801 came through the legislative process without substantial modification.

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[21] Hearings before the Senate Committee on Commerce, 75th Congress, 3rd Session, 1938, on S. 3760. The pertinent provisions in this bill were similar to those in S. 3845.

The procedure by which the President's approval is obtained is important to an understanding of this case. The Board, of course, first holds its hearings. In the normal course, as in this case, a trial examiner hears the evidence and makes a report, the parties have an opportunity to except thereto, and argument is heard by the Board. The Board thereafter prepares its decision, and, pursuant to the express requirement of Section 801, submits the decision and proposed orders and certificates (but not a transcript of the evidence at the hearing) to the President before publication thereof. The President then has an opportunity to consult with such other agencies of the Government and to obtain such additional information as he deems advisable, and in due course he returns the decision and order to the Board marked "Approved", or advises the Board as to respects in which he disagrees with the Board's proposals. In the latter situation, the Board without re-opening the proceeding then modifies its order so as to conform to the President's advice, and revises its opinion so as to state that this has been done. The revised order and opinion are re-submitted to the President, who then approves them. Not until that time is the decision made public.

The court below held that Section 801 only gave the President a veto power—the power to frustrate the Board's orders, not to make them, and this seems to have been a basis for its decision

(R. 411–412). But the history of the Section (see pp. 22–24, *supra*) as well as its language, shows that the section was designed to recognize and sanction the exercise by the President of "his constitutional control over these executive functions", and "to give the President his constitutional authority over the executive functions and those affecting international relations and national defense".[22] The exercise by the President of his "constitutional authority" would vest in him supervisory control over the Boards decision and not a mere power of veto.

That the President's power is to be directive and not merely negative is also indicated by the fact that Section 801 subjects to his approval the "denial" as well as the issuance of certificates. Disapproval by the President of the Board's proposed denial of a certificate is, of course, the equivalent of a directive that the certificate issue. The Board must render some decision on the application,[23] and if the President's approval is to be obtained its only choice in such a case is to grant the certificate.[24]

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[22] The quotations are from the testimony of Mr. Hester before the House Committee. House Hearings, pp. 37–38.

[23] Section 401 (c) provides that "such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible."

[24] The Board has declared in its Statement before the President's Air Policy Commission (October 27, 1947, p. 146):

* * * So long as he has power to disapprove the

Any doubts as to the breadth of the power given the President by Section 801 must be resolved by the consistent administrative practice under the section and the interpretation of it by both the President and the Board for the nine years in which it has been in effect. (See also Op. A. G., June 18, 1946, Vol. 40, Op. No. 110.) Every order involving a certificate or permit for foreign air transportation is submitted to the President before publication, and no decision or order is announced until after a decision satisfactory to the President has been approved by him. In every case in which he has disagreed with the Board's original decision, he has not merely returned the order without approval, but has advised the Board as to the changes he wished to be made; the Board has then obeyed his instructions by redrafting its order.[25] In doing so, the Board has not re-opened its hearing or stultified itself by making different findings on the same public record. It has merely stated the fact of the President's advice and issued a new order which the President has then approved.

Board's action, the President can continue to disapprove successive solutions suggested by the Board until the Board finally comes forth with the solution which he is willing to approve. Rather than go through this ritualistic and time-consuming process, it is preferable to have the President indicate, at the first opportunity following his consideration of the Board's recommendations, the route and carrier which he will approve. . . .

[25] See Statement of Civil Aeronautics Board before the President's Air Policy Commission, October 27, 1947, pp. 142–143.

C. TO CONSTRUE THE ACT AS AUTHORIZING JUDICIAL REVIEW OF ORDERS WHICH THE PRESIDENT MAY DISREGARD AFTER THE COURT HAS ACTED, WOULD IMPOSE UPON THE COURTS NON-JUDICIAL FUNCTIONS CONTRARY TO ARTICLE III OF THE CONSTITUTION

The above description of the manner in which the Board and the President act upon applications for certificates for foreign air transportation suggests a fundamental error in the decision below. For to permit judicial review of Board orders which become operative only if subsequently approved by the President would be in conflict with the well-established doctrine as to the nature of the judicial power.

The court below conceded that Congress has given the President "what amounts to an absolute veto as to all orders of the Board respecting all the matters named in Sec. 801", and that this veto power "would persist as to any modification of such an order by the court under Section 1006 (c) (*sic*) or any new order framed by the Board under direction of the court." (R. 411). The court further stated that it had "no power to question or review either the approval or disapproval of the President" (R. 411). This means that if the court should undertake to review the orders of the Board in question, it could not render a judgment having finality and that any judgment which it might render would necessarily be advisory and subject to revision by the President.[26]

[26] This is true whether the court is reviewing an order of the Board which has not yet been submitted to the President for approval or an order which has already been ap-

Ever since *Hayburn's Case,* 2 Dall. 409, which reflected the views of five justices of this Court sitting on circuit, this Court has held without variation that the courts created by Article III of the Constitution may only act judicially, that judicial action contemplates the making of judgments which will be binding on the parties, and that a judgment is not judicial if it is subject to review by an administrative official. *Hayburn's Case* itself involved a statute empowering the federal judges to make decisions as to Revolutionary War pensions, but these decisions would then be subject "to the consideration and suspension of the secretary at war, and then to the revision of the legislature." In *United States* v. *Ferreira,* 13 How. 40, the statute authorized the judges of the Florida district court to pass upon certain claims; if the judges "shall decide in favor of the claimants the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof." The Court, speaking through Mr. Chief Justice Taney, reaffirmed the doctrine of *Hayburn's Case,* stating that the power sought to be imposed upon the

proved by the President, for in either situation the President still possesses the power to disapprove the decisions rendered by the Board in conformance with the judgment of the court.

court "subject to the revision of a Secretary and of Congress, could not be executed by the court as a judicial power." (13 How. 49–50).

Again in *Gordon v. United States*, 117 U. S. 697, decisions of the Court of Claims were not to become effective until after an appropriation therefor "shall be estimated for by the Secretary of the Treasury"; it depended upon the Secretary "to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant" (p. 699). This was held to render the action of the Court of Claims nonjudicial, and to bar appeal to the Supreme Court in Court of Claims cases. The opinion states that Congress cannot "authorize or require this Court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties" (p. 702), and that "when the decision of the court was subject to the revision of a Secretary and Congress, it was not the exercise of a judicial power, and could not therefore be executed by the court" (p. 703). Chief Justice Taney concluded that "no principle of constitutional law has been more firmly established or more constantly adhered to" (p. 704). These decisions have been repeatedly cited with approval in subsequent

cases.[27] See particularly *In re Sanborn*, 148 U. S. 222, 226; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 483–484; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 456–457; *Muskrat* v. *United States*, 219 U. S. 346, 362; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 400–401. In the *Sanborn* case, the Court declared, in the course of holding that it had no jurisdiction to review a special finding of the Court of Claims,

> Such a finding is not made obligatory on the department to which it is reported—certainly not so in terms—and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made, by the statute, the final and indisputable basis of action either by the department or by congress.

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[27] See also Frankfurter and Landis, *Power of Congress Over Procedure In Criminal Contempts In "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1020, in which the constitutional limitations upon the authority of Congress over the courts are defined in part as follows:

> These limiting conceptions may be thus defined: (1) It is the characteristic of courts to decide and not merely to advise. Their work must be definitive and not consultative. They are an independent organ of government with finality of judgment within their domain, and not advisory adjuncts of the executive or the legislature.

> It is, therefore, within the scope of the decision in *Gordon* v. *United States*. * * *

And in *United States* v. *Jefferson Electric Co.*, 291 U. S. at 400–401, the Court stated, with respect to a statute which might be construed as authorizing a judgment which would be paid only if the claimant proved to the Commissioner that he was entitled to it:

> Decisions of this Court have long since established that it is not within the province of courts created by or under the judiciary article of the Constitution to give or review judgments of that character, for they are not final or binding adjudications.

This constitutional principle would clearly be applicable here if Section 1006(a) is construed to permit judicial review of Board orders which are subject to the approval of the President. For the court's order, whether it affirmed or set aside the Board's decision, whether it granted or denied rights to Waterman or Chicago and Southern, would not determine the rights of the parties unless the President subsequently agreed. If he did not agree, the President could completely disregard what the court had adjudged. This would be so even if the circuit court of appeals was able to review the decision of the Board before the matter ever came to the President's attention. When in fact the President makes his determination prior to the submission to the court, the

absence of any decisive character in judgments which the President may disregard if he sees fit is even more apparent.

Another line of authorities leading to the same conclusion is that which refuses to permit review of administrative determinations which occur in the middle of a proceeding and have no legal effect in and of themselves. Orders setting a case for hearing[28] and orders fixing valuation preliminary to a rate proceeding[29] are not reviewable, since they do not determine any right or obligation. Although these cases rest primarily on the principle that administrative remedies must be exhausted before the courts will act, this Court has observed (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 131) that:

> Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article III of the Constitution by what is implied from the grant of "judicial power" to determine "Cases" and "Controversies," Art. III, § 2, U. S. Constitution. Partly they are an aspect of the procedural phi-

[28] *United States* v. *Illinois Central R. Co.*, 244 U. S. 82; cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375.

[29] *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299.

losophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding.

Both administrative and constitutional reasons would thus combine to preclude review of a trial examiner's report which had no effect until a superior authority had approved it. The situation here is not basically different.

Another principle which this Court has frequently invoked in order that our constitutional structure shall provide a workable governmental machinery is that of precluding judicial review of political questions.[30] "In determining whether a question falls within that category [political and not justiciable], the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations. There are many illustrations in the field of our conduct of foreign relations, where there are considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice.'" *Coleman* v. *Miller*, 307 U. S. 433, 454–

[30] See Frankfurter and Landis, *op. cit.*, *supra*, p. 31, 37 Harv. L. Rev. 1021–1022, which includes "the conduct of foreign affairs" as among the subjects as to which "the courts are not the organ of government adapted for their solution."

455. Earlier, in *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302, the Court also said:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. * * *

We have shown that the awarding of foreign air transportation routes is, in large part, a matter of diplomatic as well as military concern. The ultimate decision must depend upon international negotiations. Awards may be granted upon the basis, *inter alia*, of what the President and the State Department believe will most facilitate accords with other countries. The factual foundation of the President's action will frequently not be public or susceptible to judicial review. This Court's statements in *Curtiss-Wright Corp.* v. *United States*, 299 U. S. 304, 319–321, with respect to the comparative positions of Congress and the President in dealing with foreign affairs, have even greater strength as between the President and the Judiciary. The President, "not Congress", the Court declared,

> has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other

> officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. * * * [pp. 319–320.]
>
> * * * * * *
>
> When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. [p. 321.]

The reasoning of these authorities we think requires the conclusion that such matters as the awarding of foreign air routes present political questions and are not appropriate for judicial review.[21]

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[21] Respondent and the court below seek to avoid the effect of this principle by arguing that the court reviews the order of the Board, not that of the President, which is conceded not to be subject to judicial scrutiny. But in substance the Board's order is merely a recommendation to the President. The situation is similar to that presented in *United States* v. *Bush & Co.*, 310 U. S. 371, which involved the provisions of the Tariff Act whereby the Tariff Commission would report its recommendations to the President and he would then issue a proclamation if he agreed. In refusing to permit judicial review, this Court stated (p. 379):

> It is the judgment of the President on those facts which is determinative of whether or not the recom-

It is, of course, axiomatic that statutes will be given a constitutional construction. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390. The strength of this rule necessarily increases with the certainty that a different construction would be invalid. In this case, if the Court were of the view that Congress really intended that Board action subject to the President's authority was to be judicially reviewed, it would be faced with the necessity of declaring the provision for such review *pro tanto* in violation of Article III of the Constitution. Since the invalidity of such an application of Section 1006 (a) obviously would not nullify the remainder of the Act (even apart from the severability clause, Section 1109), the effect of declaring Section 1006 (a) partially unconstitutional and of construing it so as to avoid that result would be precisely the same. For the reasons to be stated, we do not think that Section 1006 (a) need be construed in the manner urged by the respondent. It would therefore be appropriate

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mended rates will be promulgated. In substance and to a great extent in form * * * the action of the Commission and the President is but one stage of the legislative process.

The *Bush* case indicates, we think, that the substantive nature of the functions of the Board and of the President controls, not whether the Board's submission to the President is called a report or an order.

for the Court to avoid the constitutional difficulty by interpreting the section as not requiring the courts to review Board orders which the President may disregard.

D. THE CIVIL AERONAUTICS ACT MAY BE CONSTITUTIONALLY CONSTRUED AS NOT REQUIRING JUDICIAL REVIEW OF BOARD ORDERS WHICH ARE SUBJECT TO PRESIDENTIAL APPROVAL

To construe Section 1006 (a) as not extending to orders which are subject to Presidential approval will not require the use of any but familiar principles of statutory construction.

The controlling phrase in the subsection is "any order" issued by the Board. These words are not novel. The Urgent Deficiencies Act (28 U. S. C. 46) refers to suits to enjoin "any order of the Interstate Commerce Commission." The provisions for review in the Federal Power Act refer to "an order" of the Federal Power Commission. And yet this Court has not hesitated to hold that such language should not "be construed as authorizing a review of every order that the Commission may make, albeit of a merely procedural character." *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383. The Court's opinion in the *Metropolitan Edison* case reviews the decisions which have held that despite the phrase "any order" in the Urgent Deficiencies Act, "there are many orders of the Commission which are not judicially reviewable under this provision." *Rochester Telephone*

Corp. v. United States, 307 U. S. 125, which overturned the negative order doctrine, did not cast doubt on this general principle, but on the contrary reaffirmed it. See 307 U. S. at pp. 130–131.

The same principle of construction should be given effect here with respect to almost the identical statutory phrase used in a similar setting. The orders of the Civil Aeronautics Board, which are subject to the President's approval, have no more legal effect by themselves in the absence of such approval than the valuation orders held to be nonreviewable in *United States* v. *Los Angeles and Salt Lake R. Co.*, 273 U. S. 299, 309. When orders of the Civil Aeronautics Board are subject to the approval of a higher authority, who acts in a sphere which is not susceptible of judicial control, there are more reasons than in the statutes we have cited for not giving "any order" a literally all-inclusive construction.

As against this, there is the argument of *expressio unius est exclusio alterius*—that the specificity of the exception for foreign air carriers means that other exceptions were not intended. The fact that § 1006 (a) was revised in committee[22] so as to narrow the exception from

[22] Cf. S. 3845, 75th Cong., 3d sess., as introduced on April 14, 1938, and the Senate committee print of April 19, 1938, which contains the bill as reported. The amendment proposed by the committee was agreed to on the floor of the Senate. 83 Cong. Rec. 6764. There was no discussion as to the reason for this change and no explanation of it was ever made. In the House, the bills at one time exempted

"order in respect of foreign air transportation" to "order in respect of any foreign air carrier" would in and of itself carry great weight in this direction. But whatever force this fact might otherwise have is outweighed, we submit, by the internal inconsistencies which will result, if no exception for any other type of order is allowed, by the nature of the statutory scheme with respect to orders affecting foreign affairs and the reluctance of the courts to participate in the determination of such matters, and by the serious constitutional barrier to making the judicial action subordinate to the authority of the Chief Executive.

Inconsistency with Section 801. Although the limited exception in 1006 (a) may be said to manifest an intention that orders of the Board with respect to foreign air transportation by American carriers be subject to review by the courts, Section 801 manifests an intention that such orders be subject to the control of the President.

It is not contended by respondent that Section 1006 (a) permits judicial review of orders of the

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from review all orders approved by the President. H. R. 7273, print of January 22, 1938, § 905; H. R. 9738, March 4, 1938, § 1005 (a). H. R. 9738 was subsequently amended in Committee to except from review only orders with respect to foreign air carriers. See prints of April 6, 1938, and April 28, 1938, which is the form in which the bill was reported. The conference committee accepted the Senate version of Section 1006 (a), which differed in language but not in substance from the House draft.

President, and the court below held that this was not the case. See pp. 13–14, *supra*. The language of the section provides only for review of orders of the Board. The matters which the President must take into account are unsuitable for judicial action. He must negotiate with foreign powers, and base his decision on his knowledge of foreign affairs and military necessity, matters which are peculiarly within the province of the two political departments of the Government rather than the judicial, as this Court has often recognized.[33] He can act, and is intended to act, upon the basis of official and confidential information available only to him as the Chief Executive concerned with our international relations and as Commander-in-Chief of our armed forces. The extent to which he relies on facts presented to the Board, as contrasted with facts not contained in the Board's record, cannot be ascertained in any particular case. The confidential nature of his information, which may relate to matters of military as well as of diplomatic importance, in itself precludes any such disclosure. The nature of the subject thus precludes the President from making findings disclosing the reasons for his decision, and as the court below conceded (R. 411), he is required to

[33] *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302, and cases cited; *Coleman* v. *Miller*, 307 U. S. 433, 454–455, and authorities cited. Cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

give no reasons. Determinations based on such material are hardly susceptible of judicial review.[34]

We may thus start with the concession of respondents and the court below that the President's decision was not intended to be reviewed. Respondent contends, however, that the Board's order may be reviewed.

This argument assumes that the Board's order and the President's are readily separable. The method of review, as outlined by the court below,

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[34] "The Board in its consideration of new route cases is necessarily confined to the record made before it by the parties to the proceeding and must be governed by the principles set forth in Section 2 of the Act defining public convenience and necessity. After thorough consideration of the record, the Board, which is the administrative agency charged with the primary responsibility for the development of a sound air transportation system, makes its recommendations in considerable detail to the President for his consideration. However, the President has an additional responsibility in all matters pertaining to the proper conduct of our international relations. Under the Constitution it is the President's responsibility and duty to conduct the foreign affairs of the United States. The President has access to many sources of information and to data which are not included in the record before the Board. Indeed, much of this data may consist of secret and confidential material which it would be improper to include in an open record. The President must also take into consideration many factors relating to the conduct of international affairs of which the Board is unaware." Statement of Civil Aeronautics Board before the President's Air Policy Commission, dated October 27, 1947, p. 144.

seemingly was for the court to review the Board's findings, for the Board to conform to the court's decision, and then for the Board's order as judicially approved to be submitted to the President. The court said in this connection (R. 411):

> * * * the Board's action is subject to court review to the extent the Act provides and permits. It is not final till the Board and the court have completed their functions. Thereafter the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801.[35]

The difficulty with this is that Section 801 provides for Presidential approval before the Board's decision is ever made public. It states that "all decisions thereon by the Board shall be submitted to the President *before publication.*" Although this does not say in express terms that the President is to pass upon the Board's decision before publication, that is obviously what is contemplated, and that is what is actually done, as we have shown. See pp. 25–27, *supra*. Thus, as in this case, the Board's order and opinion were first submitted to the President before publication. The President disapproved certain portions of the decision, presumably after consulting with the State Department and other interested agencies, and advised the Board as

[35] Subsequently in its opinion the Court indicated that the President could disapprove "after as before the court acts" (R. 412).

to the changes which would be required (R. 125). The Board thereupon modified its order and on May 17, 1946, resubmitted the revised order and opinion to the President for approval (R. 118, 287). The President's approval was dated May 22, 1946 (R. 287). Only then was anything made public, and what was published were the final orders and opinion with the President's approval attached.

No statement appears as to the reasons for the President's modifications, apart from a general reference to "certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility" (R. 125). Nor is any reason given for the President's concurrence in the remainder of the Board's decision. It must be assumed that he took into account the same "other matters for which the Chief Executive has special responsibility" with respect to the portions of the Board's recommendation which he approved as for the portion which he disapproved. His approval may have been motivated by reasons of his own in addition to those advanced by the Board.

Respondent contends that after all this has transpired the Board's order—though not the President's—is to be judicially reviewed. But the Board has published no order which has not first been approved by the President. At this stage the Board's order has merged into and become inseparable from the President's. For a

court to set aside or modify an order which the President has approved would in fact be to reject the President's order, though the court purported to act only in relation to the Board's reasoning and the facts in the record before the Board. If the court could not set aside the order as approved, but merely the Board's recommendation, the judicial proceeding would, of course, be futile.

If the President has disapproved the Board's recommendation, judicial review of the Board's action is even more fruitless. For, as we have seen (pp. 25–27, *supra*), the Board in such circumstances merely modifies its orders to conform to the President's instructions. Clearly there is no point to reviewing the Board's "decision," since whether the court sustains or reverses the Board, the order approved by the President will eventually be issued.

The system of judicial review conceived by the court below can function only on the hypothesis that the courts will review the Board's action prior to Presidential approval. But Section 801, with its provision for submission to the President in advance of publication, is inconsistent with this hypothesis.

Incompatibility with other provisions of Section 1006. The lower court's interpretation of Section 1006 (a) as authorizing review of orders subject to the President's approval is also inconsistent with the scheme clearly contemplated by other

portions of Section 1006. Thus, Section 1006 (d) provides that upon the filing of a petition for review and its transmittal to the Board.

> * * * the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. * * *

But with respect to orders subject to Presidential approval under Section 801 the court's jurisdiction to affirm, modify or set aside the Board's orders is clearly not exclusive. Furthermore, Section 1006 (d) contemplates that the court's jurisdiction shall be not only exclusive but conclusive (except upon the Supreme Court). But this cannot be so as to orders which the President must later approve. The same comment applies to Section 1006 (f), which provides that the judgments of the circuit courts of appeals "shall be subject *only* to review by the Supreme Court". Such language is hardly compatible with a scheme in which the order approved by the court may be subsequently reviewed by the President.

Section 1006 (e) provides:

> The findings of fact by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

The Board's findings of fact are not, however, intended to be binding upon the President when he acts under Section 801; as previously shown, the Board may be required to take action to carry into effect the decision of the President, possibly without any reliance upon its own findings. But Section 1006 (e) assumes that the court will determine whether the *Board's* findings are adequately supported—a function of no consequence when neither the Board's findings nor the evidence before it may be the basis for the order which it has actually entered after submitting the matter to the President.

We submit that for the above reasons not only would judicial review of orders covered by Section 801 be inconsistent with the general Congressional purpose to recognize the President's authority over foreign air transportation, but that it would be incompatible with the statutory provisions to which we have referred. As the Circuit Court of Appeals for the Second Circuit stated in the *Pan American* case (121 F. 2d, at 814):

> * * * It seems incredible that in enacting Section 1006 (a) Congress intended to permit a review of the action of the Board in cases where the constitutional authority of the President to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and

even of the denial of them, would necessarily render our review futile. *United States* v. *Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255. The review of the order authorizing the issuance of the certificates is so dependent upon considerations resting in Executive discretion that it cannot be regarded as authorized by Section 1006 (a).

The Administrative Procedure Act, 60 Stat. 237 (5 U. S. C. 1001, 1009) does not provide for review of the orders here involved. Section 10 exempts from its requirements as to judicial review action which is "by law committed to agency discretion". This would clearly apply to the action of the President. Matters in the field of foreign and military policy are committed to his discretion both in the historical sense of that term and within the intent of the Civil Aeronautics Act.[36] Orders of the Board prior to the President's approval are not reviewable because they are "intermediate," not "final," agency action. See Section 10 (c).[37] Orders of the Board after

[36] The nature of the exemption in Section 10 was explained by the Senate Committee on the Judiciary as follows: "The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review." S. Rep. 752, 79th Cong., 1st Sess., 26. See also H. Rep. 1980, 79th Cong., 2d Sess., 41.

[37] "Every agency action made reviewable by statute and every final agency action for which there is no other ade-

the President's approval are not separable from the decisions of the President, for reasons already set forth. And the Administrative Procedure Act does not, and, of course, could not, provide for the unconstitutional type of review required by the decision below, which subordinates the court's order to the President's ultimate control.[28]

II

IF SECTION 1006 (A) OF THE CIVIL AERONAUTICS ACT IS CONSTRUED AS PROVIDING JUDICIAL REVIEW FOR ORDERS OF THE CIVIL AERONAUTICS BOARD WHICH ARE SUBJECT TO THE APPROVAL OF THE PRESIDENT, SUCH REVIEW IS INHERENTLY LIMITED TO DETERMINATION OF WHETHER SUCH ORDERS ARE BEYOND THE AUTHORITY CONFERRED BY THE ACT AND WERE ISSUED AFTER COMPLIANCE WITH THE STATUTORY PROCEDURES. UNDER THESE PRINCIPLES NO GROUND FOR REVERSAL OF THE BOARD'S ORDER IS SHOWN

A. REVIEW WOULD NOT EXTEND TO THE EXERCISE OF THE PRESIDENT'S DISCRETIONARY AUTHORITY

It has been shown in Point I that a serious constitutional barrier is encountered if Section 1006 is construed, as the court below construed it,

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quate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action * * *"

[28] Since the petition for review was filed on September 6, 1946, while the Administrative Procedure Act generally became effective on September 11, 1946, it is also possible that Section 10 of that Act should be construed as inapplicable to judicial review proceedings instituted prior to that date. See Section 12 of the Administrative Procedure Act, and cf. *United States* v. *Rusicka*, 329 U. S. 287.

to provide for judicial review of the Board's action prior to the approval of the President required by Section 801. We now point out that if Section 1006 is construed to provide for review by the circuit court of appeals of the Board's order *as* approved by the President, such review is subject to limitations inherent in the scheme of the Civil Aeronautics Act and in the relationship between courts and executive agencies.

The President's power over the issuance or denial of certificates authorizing an air carrier to engage in overseas or foreign air transportation is, as we have seen, one of plenary discretion. Section 801 simply provides that the issuance or denial, *inter alia, of* such certificates "shall be subject to the approval of the President." The Act imposes no restrictions upon the discretion to be exercised by the President after the Board has completed its functions. Rather the Act and its history breathe intention that the President shall exercise, with respect to the Board's proposed order, an unrestrained supervision which will correlate the development of foreign air transportation with those other elements of diplomatic and military policy which are his peculiar responsibility, and which can seldom be revealed in a judicially reviewable record. This discretionary power of the President is unreviewable—there is nothing to review. Since the President in exercising his discretion is not required to limit

himself to the evidence before the Board, there can be no basis upon which a reviewing court may determine whether his decision is supported by evidence.

This means that the judicial function does not extend to review of the determination "that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the [Board] hereunder, and that such transportation is required by the public convenience and necessity." For the determination as to whether an applicant is thus qualified falls within the area of discretion in which the President's decision may not be reviewed. The Board's original findings and recommendations become inseparably merged with the President's action pursuant to Section 801. The courts cannot tell whether a particular finding by the Board had any bearing on the result reached by the joint President-Board action, or, stated differently, whether the President's exercise of discretion would be changed if the Board's findings are modified or set aside. Under these circumstances, it is incompatible with the judicial function for a court to review the Board's finding as to such matters as the public convenience and necessity and the fitness, willingness, and ability of applicants for certificates authorizing overseas or foreign air transportation.

While the exercise of the President's discretionary power is not subject to judicial review, there remains the question whether any other elements of the joint President-Board action are properly reviewable by the courts.

In Section 401 of the Civil Aeronautics Act, Congress has imposed various conditions precedent to the issuance of cerificates of public convenience and necessity. Public notice of the filing of an application for such a certificate must be given by the Board, and the application may be determined only after a public hearing. Section 401 (c). Also, Section 401 (f) contains affirmative and negative requirements as to the terms and conditions to be contained in any certificate which may be issued under that section. It requires, *inter alia*, that American carrier certificates for foreign air transportation must permit the handling of foreign mail. Again the certificates may not restrict the right of the carrier "to add to or change schedules". If Section 1006 (a) is construed as evidencing a Congressional purpose to provide for review, so far as practicable, of joint President-Board orders relating to certificates for overseas or foreign air transportation, then these are matters which are capable of judicial scrutiny to ascertain whether there has been compliance with the statutory requirements.

To summarize our views: the President's discretionary powers under Section 801 are not

reviewable. Questions as to the adequacy of evidence to support the Board's findings and conclusions do not present reviewable issues. The Board's compliance with such statutory requirements as notice and hearing may be reviewable, together with outright questions of law such as would be involved in the Board's failure to comply with the requirements of Section 401 (f).

B. SUCH A PATTERN OF LIMITED REVIEW IS IDENTICAL WITH THAT EVOLVED BY THE COURTS IN DEALING WITH A SIMILAR SITUATION UNDER THE TARIFF LAWS

Our analysis of the limited scope of judicial review in cases such as this, assuming that Section 1006 (a) is construed to require any judicial review of Board orders as approved by the President, finds remarkable confirmation in the judicial review which has been evolved with respect to Presidential proclamations under the flexible tariff provisions of the tariff acts.

Under Section 315 of the Tariff Act of 1922 (Act of September 21, 1922, c. 356, Title III, Sec. 315, 42 Stat. 858, 941), the President was authorized by proclamation to increase or decrease the rates of duty specified in that Act if he found upon investigation that such action was necessary to equalize differences in costs of production as between the United States and other countries. It was further provided that, "Investigations to assist the President in ascertaining differences in costs of production under this

section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard."

Section 336 of the Tariff Act of 1930, Act of June 17, 1930, c. 497, 46 Stat. 590, 701, 19 U. S. C. 1336, which superseded Section 315 of the earlier Act, provides a similar pattern. After an investigation in which the Tariff Commission "shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings", the Commission reports to the President the results of the investigation and its findings with respect to such differences in costs of production, and specifies in its report such increases or decreases in the statutory rates of duty as it finds necessary to equalize such differences. Thereafter, the President may approve by proclamation the changes in duty specified in the Commission's report "if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production."

Both the Tariff Acts of 1922 and 1930 thus pro-

vided for an investigation by the Tariff Commission, to include notice and public hearing and receipt of evidence; thereafter, the President acts. Neither Act provided for direct review of the President's proclamations, but under the statutory protest procedure importers sought to challenge in the Customs Court and the Court of Customs and Patent Appeals the validity of increases in duty resulting from such proclamations. As a result of such cases, it has been stated that an investigation by the Tariff Commission is a condition precedent to action by the President. *Hampton & Co.* v. *United States,* 276 U. S. 394, 405; *William A. Foster & Co. Inc.* v. *United States,* 20 C. C. P. A. (Customs) 15; *United States* v. *Fox River Butter Co.,* 20 C. C. P. A. (Customs) 38, certiorari denied, 287 U. S. 628. Specifically, it has been held that where the public notice given by the Tariff Commission relates to one commodity while the President's proclamation changes the duty on a commodity not mentioned in the notice, there has been such a failure to comply with the statutory procedure that the increase in the duty is void. *Carl Zeiss, Inc.* v. *United States,* 76 F. 2d 412 (C. C. P. A. Customs). And it has been assumed that if the President exceeded his authority under the statute, as by increasing or decreasing rates of duty by more than 50 percent or by transferring commodities from the free list to the duty list, such

action could be invalidated in a proper proceeding. *William A. Foster & Co. Inc.* v. *United States, supra,* at pp. 23–25.

However, in *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, and in *United States* v. *Bush & Co.,* 310 U. S. 371, this Court held flatly that neither the findings of the Tariff Commission nor the final action of the President were reviewable on the substantive merits, i. e., whether such findings or such action was justified by the evidence adduced before the Commission. In the *Norwegian Nitrogen Products* case, involving Section 315 of the Tariff Act of 1922, this Court put it as follows (at p. 318):

> * * * What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed.

In the *Bush* case, arising under Section 336 of the Tariff Act of 1930, this Court, in refusing to review the correctness of the President's exercise of discretion, characterized the situation in these terms (at pp. 379–380):

The powers which Congress has entrusted to the President under the Act of 1930 do not essentially differ in kind from those which have been granted him under the tariff acts for well over a century. See *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 293, 308 *et seq.,* for a review of the statutes. Since its creation in 1916 the Commission has acted as an adviser to the Congress or to the President. Under § 336 of the Act of 1930 the Commission serves the President in that role. It does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President. It is the judgment of the President on those facts which is determinative of whether or not the recommended rates will be promulgated. * * * And the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. *Martin* v. *Mott,* 12 Wheat. 19; *Monongahela Bridge*

> *Co.* v. *United States,* 216 U. S. 177; *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163; *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1. As stated by Mr. Justice Story in *Martin* v. *Mott, supra,* pp. 31–32: "Wherever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

Since then the United States Customs Court, specifically concerned with such tariff matters, has recognized and held that the decision of this Court in the *Bush* case prohibits a review of the proceeding before the Tariff Commission for the purpose of ascertaining whether Presidential action is supported by substantial evidence. *Mitsui & Co.* v. *United States,* 6 Cust. Rep. 406 (C. D. 505, 1941); *T. M. Duche & Sons* v. *United States,* 13 Cust. Rep. 26 (C. D. 863, 1944); *T. M. Duche & Sons* v. *United States,* 82 Treas. Dec. No. 5, p. 15 (C. D. 1040, January 15, 1947), appeal pending (C. C. A.). In the language of the Customs Court in the latter case (82 Treas. Dec. No. 5, at page 17):

> We are of the opinion that this court is not empowered under the statute to examine the report of the Tariff Commission and the evidence before it in order to determine whether or not the findings of

the Commission were based upon substantial evidence. The well-settled principle of law which may be appropriately applied here limits judicial inquiry to an examination of the proceedings of the Tariff Commission to ascertain whether the jurisdictional requirements of the statute, section 336 of the Tariff Act of 1930, have been complied with. To go further, however, and explore the reasons which actuate the President in the exercise of his judgment in making his proclamation or to weigh the evidence before the Tariff Commission would transcend the province of the courts in cases of this nature.

In our opinion, whether or not we may judicially inquire into the proceedings of the Tariff Commission, weigh the evidence presented before that body to determine whether it would substantiate the report made to the President, or question the reasons underlying the Presidential proclamation, are questions fully covered by the Supreme Court in the *Bush* case, *supra*.[39]

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[39] In the cited cases, the Customs Court squarely recognizes that the rule applied in *David L. Moss, Inc.* v. *United States*, 103 F. 2d 395 (C. C. P. A.), which is heavily relied upon by the respondent below, was overruled by this Court in *United States* v. *Bush & Co.*, *supra*. See particularly *T. M. Duche & Sons* v. *United States*, 13 Customs Rep. 26, 30, where it is said:

> * * * The issue herein relates to the legality of a finding of fact by the President upon a subject which is strictly within his discretionary powers.
>
> The testimony taken before the Tariff Commission and

The analogy is persuasive. The Tariff Commission, after notice and hearing, reports to the President the specific changes in rates of duty which it believes are necessary to equalize differences in cost of production. Thereafter, the President may by proclamation approve the changes proposed by the Commission (he cannot fix any others) *"if in his judgment"* such changes are *"shown by such investigation of the commission* to be necessary to equalize such differences in costs of production". (Italics supplied.) It is to be noted also that under the Tariff Act of 1930 the President is directed to exercise his discretion in the light of the same standard as is prescribed for the Commission, i. e., equalizing differences in costs of production. So, too, the Civil Aeronautics Board, after notice and hearing, submits to the President its proposed order disposing of applications for certificates to engage in foreign air transportation. Under the Civil Aeronautics Act, however, the President's discretion is far broader. He is

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the report of that body on the case, were admitted in evidence inasmuch as it had been held by the appellate court, in *David L. Moss Co., Inc.* v. *United States*, *supra*, that such evidence was the proper subject of review by the court. However, the trial occurred prior to the decision of the United States Supreme Court in the case of *United States* v. *George S. Bush & Co., Inc.*, *supra*, in which case it was held that the court could not review such documents. It is evident from the decision of the United States Supreme Court, above referred to, that the exhibits should not have been received in evidence for the purpose for which they were introduced.

expected to exercise his discretionary power in relation to diplomatic and military considerations which are completely alien to the scope of the Board's precedent hearing and findings. Since under the Tariff Act, where the President is limited to consideration of matters shown by the Commission's investigation, neither the findings of the Commission nor the action of the President are reviewable to determine whether such findings or such actions are supported by substantial evidence, the same result follows, *a fortiori,* under the Civil Aeronautics Act where the President is not so limited.

C. THE PETITION FOR REVIEW BELOW IS INSUFFICIENT AS A MATTER OF LAW TO INVOKE THE JURISDICTION OF THE COURT

We have shown that if the Civil Aeronautics Act is construed to require judicial review of Board orders subject to approval of the President after such approval, review must be limited to questions of whether the President has acted within the authority conferred by the Act and of whether there has been compliance with the statutory procedures. The petition for review (R. 1-9) shows on its face that, with at most two exceptions, every objection of the respondent (petitioner below) is directed at the correctness of the Board's findings of fact on such issues as the fitness, willingness and ability of C & S and at the alleged inadequacy of the evidence underlying the Board's

findings (R. 6–8). But, as pointed out, *supra*, these findings have become so merged with the President's discretionary action pursuant to Section 801 that they are incapable of review. Respondent's objections based upon the Board's denial of its motion to reopen the proceeding and to receive further evidence are merely another attack upon the sufficiency of the evidence supporting the Board's findings and are similarly unreviewable.

The petition does purport to raise a question of law, i. e., whether the Board was in error as a matter of law in "holding that a surface carrier upon an application of Section 401 of the Act must meet the tests of Section 408 (b) of the Act" (R. 7). However, this represents no justiciable issue under any concept of reviewability because the Board stated flatly in its opinion that it had not applied Section 408 (b) to the surface carrier applicants in this case, but was merely stating its position "for the guidance of future applicants" (R. 202).[40] For the Board declared (R. 211):

> Since we have concluded that the comparative public convenience and necessity would be best served by selecting Chicago and

[40] The Board's opinion states on this point (R. 202):

"Although we do not find it necessary to decide the question whether the several steamship applicants for the New York-San Juan route met the requirements of the second proviso of section 408, we think it advisable for

Southern to provide service over this route, it is unnecessary to determine whether Waterman has met the tests of the second proviso of section 408.

The petition also asserted that the Board "failed to make an appropriate finding that C & S is fit, willing and able, as required by Section 401 (d) of the Act" (R. 6). To the contrary, the Board specifically stated that "we find that * * * each [carrier to whom it proposed to issue certificates] is fit, willing, and able properly to perform the air transportation herein authorized, respectively, and to conform to the provisions of the Act of the rules, regulations, and requirements of the Board thereunder" (R. 230). If such a finding is a reviewable jurisdictional requirement, it has been made.

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the guidance of future applicants to express our opinion on the question whether the special restrictive conditions of section 408 (b) of the Civil Aeronautics Act covering the acquisition of air carriers by surface carrier are contained within the statutory standards of public convenience and necessity appearing in section 401 and therefore whether a surface carrier in applying for a certificate is under a *legal* restriction to which other applicants are not subject."

This question was subsequently reconsidered by the Board and its position modified in *Petition of American President Lines, Ltd.*, Docket No. 2411, decided March 19, 1947. It is to be noted that neither in the Latin American case nor in any other new route proceedings has the Board denied an application on the ground that a surface carrier applicant fails to meet the restrictive requirements of Section 408 (b).

Thus, apart from the two points shown to be baseless on the face of the Board's opinion, there were presented to the reviewing court in this case only issues relating to the sufficiency of the Board's findings of fact. Under well-established principles, these issues, upon approval by the President of the Board's recommendation, are unreviewable. Accordingly, there is nothing for the court below to review and it should be directed to dismiss the petition.[11]

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[11] While the petition for review also refers to the Board's order of July 12, 1946 (R. 328) denying respondent's petition for rehearing and reconsideration (R. 290), that petition for rehearing and reconsideration represents merely the petitioner's concern to protect his avenue to judicial review by exhausting all available administrative remedies. See *Braniff Airways, Inc.* v. *C. A. B.*, 147 F. 2d 152 (App. D. C.); *Saginaw Broadcasting Co.* v. *F. C. C.*, 96 F. 2d 554 (App. D. C.). In any event, our argument as to lack of reviewability of the Board's substantive orders clearly covers applications for rehearing and reconsideration. See also *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 514–519; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 534–535.

CONCLUSION

For the above reasons, it is respectfully submitted that the order of the court below refusing to dismiss the petition for review should be reversed.

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NOVEMBER 1947.

APPENDIX

PERTINENT PROVISIONS OF THE CIVIL AERONAUTICS ACT OF 1938, AS AMENDED[1]

SEC. 1. As used in this Act, unless the context otherwise requires—

* * * * * *

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation * * *

* * * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * * * * *

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in foreign air transportation.

* * * * * *

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common car-

[1] Act of June 23, 1938, c. 601, 52 Stat. 977; Reorg. Plan No. IV, § 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235 (49 U. S. C. 401 *et seq.*).

rier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession (except the Philippine Islands) of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * * * * *

SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation * * *.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

* * * * * *

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal

and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. * * *

* * * * *

SEC. 402 (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage * * *.

* * * * *

SEC. 408 (b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be ful-

filled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5 (8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

* * * * *

SEC. 801. The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section

402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof. * * *.

* * * * * *

SEC. 802. The Secretary of State shall advise the Board of, and consult with the Board concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services.

* * * * * *

SEC. 1006. (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board by the clerk of the court; and the Board shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

(d) Upon transmittal of the petition to the Board, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Board.

(e) The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code.

* * * * * *

SEC. 1102. In exercising and performing its powers and duties under this Act, the Board shall do so consistently with any obligation assumed by

the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, shall take into consideration any applicable laws and requirements of foreign countries and shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: *Provided,* That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest.

U. S. GOVERNMENT PRINTING OFFICE: 1947

SUPREME COURT OF THE UNITED STATES

NOS. 78 AND 88.—OCTOBER TERM, 1947.

Chicago and Southern Air Lines, Inc., Petitioner, 78 *v.* Waterman Steamship Corporation. Civil Aeronautics Board, Petitioner, 88 *v.* Waterman Steamship Corporation.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 9, 1948.]

MR. JUSTICE JACKSON delivered the opinion of the Court.

The question of law which brings this controversy here is whether § 1006 of the Civil Aeronautics Act, 49 U. S. C. 646, authorizing judicial review of described orders of the Civil Aeronautics Board, includes those which grant or deny applications by citizen carriers to engage in overseas and foreign air transportation which are subject to approval by the President under § 801 of the Act. 49 U. S. C. 601.

By proceedings not challenged as to regularity, the Board, with express approval of the President, issued an order which denied Waterman Steamship Corporation a certificate of convenience and necessity for an air route and granted one to Chicago and Southern Air Lines, a rival applicant. Routes sought by both carrier interests involved overseas air transportation, § 1 (21) (b), between Continental United States and Caribbean possessions and also foreign air transportation, § 1 (21) (c), between the United States and foreign countries. Waterman filed a petition for review under § 1006 of the Act with the Circuit Court of Appeals for the Fifth Circuit. Chicago and Southern intervened. Both the latter and the

Board moved to dismiss, the grounds pertinent here being that because the order required and had approval of the President, under § 801 of the Act, it was not reviewable. The Court of Appeals disclaimed any power to question or review either the President's approval or his disapproval, but it regarded any Board order as incomplete until court review, after which "the completed action must be approved by the President as to citizen air carriers in cases under Section 801." 159 F. 2d 828. Accordingly, it refused to dismiss the petition and asserted jurisdiction. Its decision conflicts with one by the Court of Appeals for the Second Circuit. *Pan American Airways, Inc.* v. *Civil Aeronautics Board*, 121 F. 2d 810. We granted certiorari both to the Chicago and Southern Air Lines, Inc. (No. 78) and to the Board (No. 88) to resolve the conflict.

Congress has set up a comprehensive scheme for regulation of common carriers by air. Many statutory provisions apply indifferently whether the carrier is a foreign air carrier or a citizen air carrier, and whether the carriage involved is "interstate air commerce," "overseas air commerce" or "foreign air commerce," each being appropriately defined. 49 U. S. C. 401 (20). All air carriers by similar procedures must obtain from the Board certificates of convenience and necessity by showing a public interest in establishment of the route and the applicant's ability to serve it. But when a foreign carrier asks for any permit, or a citizen carrier applies for a certificate to engage in any overseas or foreign air transportation, a copy of the application must be transmitted to the President before hearing; and any decision, either to grant or to deny, must be submitted to the President before publication and is unconditionally subject to the President's approval. Also the statute subjects to judicial review "any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the

President as provided in Section 801 of this Act." It grants no express exemption to an order such as the one before us, which concerns a citizen carrier but which must have Presidential approval because it involves overseas and foreign air transportation. The question is whether an exemption is to be implied.

This Court long has held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of "any order" or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review. Examples are set forth by Chief Justice Hughes in *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375, 384. *Cf. Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130.

The Waterman Steamship Corporation urges that review of the problems involved in establishing foreign air routes are of no more international delicacy or strategic importance than those involved in routes for water carriage. It says, "It is submitted that there is no basic difference between the conduct of the foreign commerce of the United States by air or by sea." From this premise it reasons that we should interpret this statute to follow the pattern of judicial review adopted in relation to orders affecting foreign commerce by rail, *Lewis Simas Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654; *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, or communications by wire, *United States* v. *Western Union Telegraph Co.*, 272 F. 893, or by radio, *Mackay Radio & Telegraph Co.* v. *Federal Communications Commission*, 97 F. 2d 641; and it likens the subject-matter of aeronautics legislation to that of Title VI of the Merchant

Marine Act of 1936, 46 U. S. C. § 1171, and the function of the Aeronautics Board in respect to overseas and foreign air transportation to that of the Maritime Commission to such commerce when water-borne.

We find no indication that the Congress either entertained or fostered the narrow concept that air-borne commerce is a mere outgrowth or overgrowth of surface-bound transport. Of course, air transportation, water transportation, rail transportation, and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past. While transport by land and by sea began before any existing government was established and their respective customs and practices matured into bodies of carrier law independently of legislation, air transport burst suddenly upon modern governments, offering new advantages, demanding new rights and carrying new threats which society could meet with timely adjustments only by prompt invocation of legislative authority. However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimen-

sions should be judicially circumscribed with analogies taken over from two-dimensional transit.

The "public interest" that enters into awards of routes for aerial carriers, who in effect obtain also a sponsorship by our government in foreign ventures, is not confined to adequacy of transportation service, as we have held when that term is applied to railroads. *Texas* v. *United States*, 292 U. S. 522, 531. That aerial navigation routes and bases should be prudently correlated with facilities and plans for our own national defenses and raise new problems in conduct of foreign relations, is a fact of common knowledge. Congressional hearings and debates extending over several sessions and departmental studies of many years show that the legislative and administrative processes have proceeded in full recognition of these facts.

In the regulation of commercial aeronautics, the statute confers on the Board many powers conventional in other carrier regulation under the Congressional commerce power. They are exercised through usual procedures and apply settled standards with only customary administrative finality. Congress evidently thought of the administrative function in terms used by this Court of another of its agencies in exercising interstate commerce power: "Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and in the contemplation of the statute, must be free from executive control." *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628. Those orders which do not require Presidential approval are subject to judicial review to assure application of the standards Congress has laid down.

But when a foreign carrier seeks to engage in public carriage over the territory or waters of this country, or any carrier seeks the sponsorship of this Government to engage in overseas or foreign air transportation, Congress

has completely inverted the usual administrative process. Instead of acting independently of executive control, the agency is then subordinated to it. Instead of its order serving as a final disposition of the application, its force is exhausted when it serves as a recommendation to the President. Instead of being handed down to the parties as the conclusion of the administrative process, it must be submitted to the President, before publication even can take place. Nor is the President's control of the ultimate decision a mere right of veto. It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation or suspension, as well. And likewise subject to his approval are the terms, conditions and limitations of the order. 49 U. S. C. § 601. Thus, Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies.

Congress may of course delegate very large grants of its power over foreign commerce to the President. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *United States* v. *Bush*, 310 U. S. 371. The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs. For present purposes, the order draws vitality from either or both sources. Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies.

These considerations seem controlling on the question whether the Board's action on overseas and foreign air transportation applications by citizens are subject to revision or overthrow by the courts.

It may be conceded that a literal reading of § 1006 subjects this order to re-examination by the courts.

It also appears that the language was deliberately employed by Congress, although nothing indicates that Congress foresaw or intended the consequences ascribed to it by the decision of the Court below. The letter of the text might with equal consistency be construed to require any one of three things: first, judicial review of a decision by the President; second, judicial review of a Board order before it acquires finality through Presidential action, the court's decision on review being a binding limitation on the President's action; third, a judicial review before action by the President, the latter being at liberty wholly to disregard the court's judgment. We think none of these results is required by usual canons of construction.

In this case, submission of the Board's decision was made to the President, who disapproved certain portions of it and advised the Board of the changes which he required. The Board complied and submitted a revised order and opinion which the President approved. Only then were they made public, and that which was made public and which is before us is only the final order and opinion containing the President's amendments and bearing his approval. Only at that stage was review sought, and only then could it be pursued, for then only was the decision consummated, announced and available to the parties.

While the changes made at direction of the President may be identified, the reasons therefor are not disclosed beyond the statement that "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require" changes in the Board's opinion.

The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for

foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. *Coleman* v. *Miller*, 307 U. S. 433, 454; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–321; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302. We therefore agree that whatever of this order emanates from the President is not susceptible of review by the Judicial Department.

The court below thought that this disability could be overcome by regarding the Board as a regulatory agent of Congress to pass on such matters as the fitness, willingness and ability of the applicant, and that the Board's own determination of these matters is subject to review. The court, speaking of the Board's action, said: "It is not final till the Board and the court have completed their functions. Thereafter, the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801." The legal incongruity of interposing judicial review between the action by the Board and that by the President are as great as the practical disadvan-

tages. The latter arise chiefly from the inevitable delay and obstruction in the midst of the administrative proceedings. The former arises from the fact that until the President acts there is no final administrative determination to review. The statute would hardly have forbidden publication before submission if it had contemplated interposition of the courts at this intermediate stage. Nor could it have expected the courts to stay the President's hand after submission while they deliberate on the inchoate determination. The difficulty is manifest in this case. Review could not be sought until the order was made available, and at that time it had ceased to be merely the Board's tentative decision and had become one finalized by Presidential discretion.

Until the decision of the Board has Presidential approval, it grants no privilege and denies no right. It can give nothing and can take nothing away from the applicant or a competitor. It may be a step, which if erroneous will mature into a prejudicial result, as an order fixing valuations in a rate proceeding may foreshow and compel a prejudicial rate order. But administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299; *United States* v. *Illinois Central R. Co.*, 244 U. S. 82; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 131. The dilemma faced by those who demand judicial review of the Board's order is that, before Presidential approval, it is not a final determination even of the Board's ultimate action, and after Presidential approval, the whole order, both in what is approved without change, as well as in amendments which he directs, derives its vitality from the exercise of unreviewable Presidential discretion.

The court below considered that after it reviewed the Board's order, its judgment would be submitted to the President, that his power to disapprove would apply after as well as before the court acts, and hence that there would be no chance of a deadlock and no conflict of function. But if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government.

To revise or review an administrative decision, which has only the force of a recommendation to the President, would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action. *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40; *Gordon* v. *United States*, 117 U. S. 697; *In re Sanborn*, 148 U. S. 222; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423; *Muskrat* v. *United States*, 219 U. S. 346; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.

We conclude that orders of the Board as to certificate for overseas or foreign air transportation are not mature and are therefore not susceptible to judicial review at any time before they are finalized by Presidential approval.

After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate. This makes it unnecessary to examine the other questions raised. The petition of the Waterman Steamship Corp. should be dismissed.

Judgment reversed.

SUPREME COURT OF THE UNITED STATES

Nos. 78 and 88.—October Term, 1947.

Chicago and Southern Air Lines, Inc., Petitioner, 78 v. Waterman Steamship Corporation. Civil Aeronautics Board, Petitioner, 88 v. Waterman Steamship Corporation.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 9, 1948.]

Mr. Justice Douglas, with whom Mr. Justice Black, Mr. Justice Reed and Mr. Justice Rutledge concur, dissenting.

Congress has specifically provided for judicial review of orders of the Civil Aeronautics Board of the kind involved in this case. That review can be had without intruding on the exclusive domain of the Chief Executive. And by granting it we give effect to the interests of both the Congress and the Chief Executive in this field.

The Commerce Clause of the Constitution grants Congress control over interstate and foreign commerce. Art. I, § 8. The present Act is an exercise of that power. Congress created the Board and defined its functions. It specified the standards which the Board is to apply in granting certificates for overseas and foreign air transportation.[1] It expressly made subject to judicial review orders of the Board granting or denying certificates to citizens and withheld judicial review where the applicants are not citizens.[2] If this were all, there would be no question.

[1] See §§ 401, 408 (b), 52 Stat. 987, 1001, 49 U. S. C. §§ 481, 488.

[2] Section 1006 (a) provides in part: "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the

But Congress did not leave the matter entirely to the Board. Recognizing the important role the President plays in military and foreign affairs, it made him a participant in the process. Applications for certificates of the type involved here are transmitted to him before hearing, all decisions on the applications are submitted to him before their publication, and the orders are "subject to" his approval.[3] Since his decisions in these matters are of a character which involve an exercise of his discretion in foreign affairs or military matters, I do not think Congress intended them to be subject to judicial review.

But review of the President's action does not result from reading the statute in the way it is written. Congress made reviewable by the courts only orders "issued by the Board under this Act."[4] Those orders can be reviewed without reference to any conduct of the President, for that part of the orders which is the work of the Board is plainly identifiable.[5] The President is presum-

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circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order." 52 Stat. 1024, 54 Stat. 1235, 49 U. S. C. § 646 (a).

Section 401 (a) requires every air carrier to have a certificate before engaging in air transportation. 52 Stat. 987, 49 U. S. C. § 481 (a). There is the same requirement in case of a foreign air carrier. § 402 (a), 52 Stat. 991, 49 U. S. C. § 482 (a). An air carrier is defined as a citizen [§ 1 (2), 52 Stat. 977, 49 U. S. C. § 401 (2)], and a foreign air carrier as any person not a citizen, and engaged in foreign air transportation. § 1 (19), 52 Stat. 978, 49 U. S. C. § 401 (19).

[3] § 801. 52 Stat. 1014, 49 U. S. C. § 601.

[4] § 1006 (a), *supra*, note 2.

[5] The Board had consolidated for hearing 29 applications for certificates to engage in air transportation which were filed by 15 applicants. The President's partial disapproval of the proposed disposition of these applications did not relate to the applications involved in this case. As to them, the action of the Board stands unaltered.

ably concerned only with the impact of the order on foreign relations or military matters. To the extent that he disapproves action taken by the Board, his action controls. But where that is not done, the Board's order has an existence independent of Presidential approval, tracing to Congress' power to regulate commerce. Approval by the President under this statutory scheme has relevance for purposes of review only as indicating *when* the action of the Board is reviewable. When the Board has finished with the order, the administrative function is ended. When the order fixes rights, on clearance by the President, it becomes reviewable. But the action of the President does not broaden the review. Review is restricted to the action of the Board and the Board alone.

The statute, as I construe it, contemplates that certificates issued will rest on orders of the Board which satisfy the standards prescribed by Congress. Presidential approval cannot make valid invalid orders of the Board. His approval supplements rather than supersedes Board action. Only when the Board has acted within the limits of its authority has the basis been laid for issuance of certificates. The requirement that a valid Board order underlie each certificate thus protects the President as well as the litigants and the public interest against unlawful Board action.

The importance of the problem is evidenced by the character of cases controlled by this decision. The present ruling is not limited to cases granting or denying certificates for air transportation to and from foreign countries. It also denies power to review orders governing air transportation between two points in Alaska, between two points in Hawaii, between Seattle and Juneau, between New Orleans and San Juan.* All of those are now beyond judicial review. And so they should be so far as conduct

* By § 801 the approval of the President extends to orders "authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or posses-

of the President is concerned. But Congress has commanded otherwise as to action by the Board. The Board can act in a lawless way. With that in mind, Congress sought to preserve the integrity of the administrative process by making judicial review a check on Board action. That was the aim of Congress, now defeated by a legalism which in my view does not square with reality.

In this petition for review, the respondent charged that the Board had no substantial evidence to support its findings that Chicago and Southern Air Lines was fit, willing and able to perform its obligations under the certificate; and it charged that when a change of conditions as to Chicago and Southern Air Lines' ability to perform was called to the attention of the Board, the Board refused to reopen the case. I do not know whether there is merit in those contentions. But no matter how substantial and important the questions, they are now beyond judicial review. Today a litigant tenders questions concerning the arbitrary character of the Board's ruling. Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision. Thus the purpose of Congress is frustrated.

Judicial review would assure the President, the litigants and the public that the Board had acted within the limits of its authority. It would carry out the aim of Congress to guard against administrative action which exceeds the statutory bounds. It would give effect to the interests of both Congress and the President in this field.

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sion." 52 Stat. 1014, 49 U. S. C. § 601. Section 1 (21) includes in overseas air transportation commerce between a place in the continental United States and a place in a Territory or possession of the United States, or between a place in a Territory or possession of the United States and a place in any other Territory or possession. 52 Stat. 979, 49 U. S. C. § 401 (21).